

NOT FOR PUBLICATION

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DEC 14 2001

T.S. MCGREGOR, CLERK  
U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

In Re:	)	
	)	No. 00-07848-W63
BERZETT, MICHELLE,	)	
	)	Adv. No. A01-00153-W63
Debtor(s).	)	
<hr/>		
MICHELLE BERZETT,	)	
	)	
Plaintiff(s),	)	MEMORANDUM DECISION RE:
	)	DEFENDANT'S MOTION FOR
vs.	)	SUMMARY JUDGMENT AND
	)	PLAINTIFF'S MOTION TO
OCWEN FEDERAL BANK,	)	JOIN THE CHAPTER 13 TRUSTEE
	)	AS A PARTY UNDER FRCP 19
Defendant(s).	)	

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on November 21, 2001 upon Defendant's Motion for Summary Judgment and Plaintiff's Motion to Join the Chapter 13 Trustee as a Party Under FRCP 19. Plaintiff was represented by Clinton Henderson and Defendant was represented by Brian Lynch. The court reviewed the files and records herein, heard argument of counsel, and was fully advised in the premises. The court now enters its Memorandum Decision.

Robert Habershan owned real property in Asotin County, Washington, and in 1989 encumbered the property to Associates Financial Services Company of Idaho, Inc. (hereinafter "Associates Financial") by way of a Deed of Trust securing a Note in the amount of \$79,386.31. Robert Habershan died in 1992 and his estate was never probated. It is unknown

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1 whether he had a Will. At some unknown point, his daughter, the debtor  
2 herein, began to occupy the premises. The debtor is married to Fred  
3 Berzett who is not a debtor in the underlying Chapter 13 proceeding. In  
4 1996, the debtor and her husband gave a new Note and Deed of Trust on  
5 the property to Associates Financial in the amount of \$37,044.87. The  
6 loan proceeds primarily were used to satisfy the 1989 encumbrance to the  
7 same creditor and pay real property taxes. Some small portion satisfied  
8 an unrelated obligation of the debtor and her husband.

9 In 1999 the debtor and her husband attempted to refinance the  
10 encumbrances on the property. The 1996 Note was in default. The  
11 attempted refinance resulted in a Preliminary Title Report being  
12 obtained as of April 9, 1999. That report reflects ownership of the  
13 property is held by "heirs and devisees of Robert Habershan, deceased,  
14 their interest being subject to the administration of the estate of said  
15 decedent."

16 The title report revealed the 1989 Deed of Trust granted by Robert  
17 Habershan as it had not been released by Associates Financial when the  
18 1996 transaction occurred. The report also revealed the 1996 Deed of  
19 Trust granted by the debtor and her husband. In May of 2000, Associates  
20 Financial sold and assigned to Ocwen Federal Bank its interest in the  
21 1996 Deed of Trust and Note. It did not assign any rights under the  
22 1989 Note and Deed of Trust.

23 The debtor/plaintiff in this adversary alleges that Associates  
24 Financial and its successor-in-interest, Ocwen Federal Bank, does not  
25 have a valid lien against the real estate as at the time of the 1996  
26 Deed of Trust Associates Financial was on notice that the title to the  
27 property was not vested in the debtor or her husband. Among other

1 arguments, the debtor seeks to set aside the 1996 Deed of Trust under  
2 11 U.S.C. § 544(a)(3) of the Code, the so-called "strong-arm powers".

3 Ocwen Federal Bank argues that the debtor is estopped from  
4 challenging the validity of the 1996 Deed of Trust and Note that she  
5 executed. Ocwen Federal Bank argues it is equitably subrogated under  
6 state law to Associates Financial's rights under the 1989 Deed of Trust  
7 because the proceeds of the 1996 transaction were used to satisfy the  
8 1989 obligation. Ocwen Federal Bank also argues that only the Chapter  
9 13 Trustee in debtor's underlying bankruptcy proceeding has standing to  
10 raise the issue of 11 U.S.C. § 544(a)(3). This argument precipitated  
11 the debtor's Motion to Join the Trustee as a party plaintiff.

12 Before addressing the merits of the debtor's/plaintiff's Motion to  
13 Join the Trustee or the merits of defendant Ocwen Federal Bank's Motion  
14 for Summary Judgment, it is necessary to address whether other parties  
15 are necessary to this action. The declaration of the debtor states that  
16 the only heirs and devisees of Robert Habershan are herself and her  
17 brother. Even though Robert Habershan's estate has never been probated  
18 (and it is uncertain whether he left a Will), the debtor's brother has  
19 some undivided interest in the real estate. As such, he is a necessary  
20 party to any action to determine the validity of an encumbrance against  
21 the real estate. His rights in the property, even though the extent of  
22 those rights are not known at this time, will necessarily be affected by  
23 the outcome of this adversary. His absence creates the risk that Ocwen  
24 Federal Bank would have to litigate the validity of the 1996 Deed of  
25 Trust in some state court proceeding to which he would be a party. He  
26 is a necessary party under Fed. R. Civ. P. 19.

27 Since a necessary party has not been joined to this action, the

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1 merits of several issues raised in the Motion for Summary Judgment will  
2 not be addressed at this time. The only issue which will be addressed  
3 is the effect of 11 U.S.C. § 544(a)(3).

4 Can the Debtor Enforce the Statutory Avoiding  
5 Powers of the Trustee Under 11 U.S.C. § 544(a)(3)?

6 The strong-arm powers of a Trustee under 11 U.S.C. § 544(a)(3)  
7 allow a trustee, without regard to any knowledge of the trustee, to void  
8 any obligation incurred or any transfer made by a debtor if such would  
9 be voidable by a bona fide purchaser of real property.

10 (a) The trustee shall have, as of the commencement of the  
11 case, and without regard to any knowledge of the trustee or of  
12 any creditor, the rights and powers of, or may avoid any  
13 transfer of property of the debtor or any obligation incurred  
14 by the debtor that is voidable by -

15 . . . .

16 (3) a bona fide purchaser of real property, other  
17 than fixtures, from the debtor, against whom  
18 applicable law permits such transfer to be  
19 perfected, that obtains the status of a bona fide  
20 purchaser and has perfected such transfer at the  
21 time of the commencement of the case, whether or  
22 not such creditor exists.

23 If, at the time of the commencement of the bankruptcy proceeding, a  
24 hypothetical purchaser could have obtained bona fide purchaser status,  
25 the trustee stands in place of the hypothetical bona fide purchaser.  
26 Courts are divided on the question of whether a Chapter 13 debtor can  
27 exercise the strong-arm powers under 11 U.S.C. § 544(a)(3). No Ninth  
28 Circuit decision addresses the question.

Chapter 11 debtors-in-possession are given authority in 11 U.S.C.  
§ 1107 to exercise these and other rights and powers of a trustee, but  
11 U.S.C. § 1303 only gives Chapter 13 debtors the powers granted  
trustees in certain subsections of 11 U.S.C. § 363. None of the trustee

1 powers under 11 U.S.C. § 542(h) (avoiding certain pre-petition transfers  
2 of property) or powers under 11 U.S.C. § 542 (turnover) or powers under  
3 11 U.S.C. § 544 are granted to Chapter 13 debtors in 11 U.S.C. § 1303.  
4 A series of trial court decisions have held that the lack of any express  
5 authority in 11 U.S.C. § 1303, particularly in light of the express  
6 grant of authority in 11 U.S.C. § 1107, means Congress did not intend  
7 Chapter 13 debtors to exercise such powers. *In re Merrick*, 151 B.R. 260  
8 (Bankr. D. Idaho 1993) and *In re Steiner*, 251 B.R. 137 (Bankr. D. Ariz.  
9 2000). Other trial courts have reached the opposite conclusion. For  
10 example, see *In Matter of Einoder*, 55 B.R. 319 (Bankr. N.D. Ill. 1985).  
11 The basis for those decisions is one of practicality. Typically,  
12 Chapter 13 Trustees have no interest in exercising strong-arm powers as  
13 only the debtor benefits, not the estate.

14 In the context of this particular adversary proceeding, it is not  
15 necessary to address the question of whether the debtor or only the  
16 Trustee may exercise the strong-arm powers under 11 U.S.C. § 544, as  
17 under the facts of this case, those powers do not exist.

18 At the Time of the Bankruptcy Filing, Could  
19 a Bona Fide Purchaser Have Existed?

20 For purposes of 11 U.S.C. § 544(a)(3), a bona fide purchaser is  
21 defined by state law. As stated at page 627 of the Ninth Circuit  
22 decision in *In Re Professional Inv. Properties of America*, 955 F.2d 623  
23 (9<sup>th</sup> Cir. 1992):

24 State law determines whether a party is a bona fide purchaser.  
25 *In re Washburn and Roberts, Inc.*, 795 F.2d 870, 872 (9<sup>th</sup> Cir.  
26 1986). In Washington, a bona fide purchaser is defined as  
27 'one who without notice of another's claim of right to, or  
equity in, the property prior to his acquisition of title, has  
paid the vendor a valuable consideration.' *Miebach v.*  
*Colasurdo*, 102 Wash.2d 170, 175, 685 P.2d 1074, 1078 (1984).

1 Washington, which is a race-notice state, generally holds that  
2 a bona fide purchaser prevails over a prior transferee who has  
failed to record. RCW 65.08.070<sup>1</sup>

3 Washington courts have defined a bona fide purchaser as follows:

4 To receive protection as a **bona fide purchaser**, the  
5 purchaser must: (a) be a purchaser, not a donee,  
6 heir or devisee, (b) be bona fide, that is, act in  
7 good faith, (c) have paid value as the law defines  
8 value, and (d) be without notice, actual or  
9 constructive, of the rights, equities, or claims of  
others to or against the property. *Biles-Coleman*  
*Lumber Co. v. Lesamiz*, 49 Wash.2d 436, 302 P.2d 198  
(1956); *Barth v. Barth*, 19 Wash.2d 543, 143 P.2d  
542 (1943); 5 H. Tiffany, *Real Property* § 1300  
(1939).

10 *Grand Inv. Co. v. Savage*, 49 Wash. App. 364, 368, 742 P.2d 1262 (1987).

11 Washington is a "race notice" or Torrens Act state, i.e., a state  
12 that has developed an elaborate scheme of public recording of land  
13 ownership and encumbrances. R.C.W. 65.12, etc. In order to qualify as  
14 a bona fide purchaser of real property in this state, one must check the  
15 public records which are maintained under the Torrens Act. Typically,  
16 that is done by requesting that a title company perform a title search  
17 and issue a Preliminary Title Report. Any prospective purchaser would  
18 have constructive notice of information which would have appeared on a  
19 Preliminary Title Report as any reasonably prudent purchaser would have  
20 obtained such a report or performed an equivalent title search. The  
21

22 <sup>1</sup>The question in that case was whether the contents of the actual  
23 involuntary bankruptcy petition were sufficient notice to the Trustee  
24 of the petitioning creditor's unrecorded lien. Much of the discussion  
25 relates to the constructive notice to Trustee of the information in  
26 bankruptcy pleadings. The decision does restate the general  
proposition that a Trustee would not become a hypothetical lien  
creditor if the Trustee has been placed on actual or constructive  
notice of a possible lien or ownership interest.

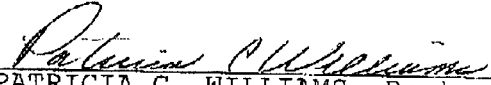
1 evidence presented indicates that certainly by 1999, and by implication  
2 after 1992 when Robert Habershan died, examination of the status of the  
3 title to the property would have revealed that ownership was held in an  
4 undetermined group of individuals or entities who were the heirs and  
5 devisees of Robert Habershan.

6 No bona fide purchaser could have existed as of the commencement of  
7 the bankruptcy proceeding. Since 11 U.S.C. § 544(a)(3) only allows a  
8 Trustee to exercise the powers of a bona fide purchaser if one could  
9 have existed, those strong-arm powers do not exist in this case. They  
10 cannot be exercised.

11 The defendant's Motion for Summary Judgment is **PARTIALLY GRANTED** to  
12 the extent it seeks to determine that neither the debtor nor the Trustee  
13 may void the 1996 Deed of Trust under 11 U.S.C. § 544(a)(3). The  
14 debtor/plaintiff's Motion to Join the Trustee is **DENIED** as there are no  
15 strong-arm powers for the Trustee to exercise. As to the joining of  
16 additional heirs and devisees (apparently the debtor's brother), the  
17 plaintiff has until **January 4, 2002** to file a request for joinder or  
18 this case will be dismissed. Defendant may note for argument the  
19 remaining issues in its Motion for Summary Judgment as soon as joinder  
20 is accomplished. The court will prepare orders to this effect.

21 The Clerk of Court is directed to file this Memorandum Decision and  
22 provide copies to counsel.

23 DATED this 14<sup>th</sup> day of December, 2001.

24  
25   
26 PATRICIA C. WILLIAMS, Bankruptcy Judge  
27

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